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John F. Scarpa Chair Lecture

LAW AND WHO WE ARE BECOMING

PATRICK MCKINLEY BRENNAN*

ENGLISH usage requires that the letter “c” in the word Catholic be capitalized inasmuch as it is part of the title John F. Scarpa Chair in Catholic Legal Studies. This is lovely, except that the required capitalization obscures whether the word is being used in its big “C” or its small “c” sense. Might the difference matter? It is no secret that with a small “c” the word means “universal,” whereas capital “C” Catholic concerns the universal church founded by Jesus Christ upon St. Peter and remaining today in full communion with the Bishop of Rome. That Church refers to itself as Catholic because of its self-understanding that it is sent by Christ to the *entire* world.¹ The Catholic Church brings Christ’s gifts to all who will receive them; and those gifts include, though they also exceed, revealing to man who he already is.

But though the capitalization required by the title veils whether the “c” would otherwise be lower or upper case, there can be very little doubt—can there?—about what John Scarpa and Dean Sargent had in mind when they were masterminding this Chair, and I wish to say, in all candor, that I respect this, indeed I would not be here today were it otherwise. The Catholic Church as part of its universal mission has much to contribute to all people’s aspirations to ordered living, to treatment consistent with their dignity as creatures made in God’s image and likeness, to the free expansion of their potential; and it has been my concern in teaching and writing to bring Catholic questions and learning to bear on what we aspire to in the name of the law.

Before saying more about that, I wish to say a word of thanks to those present who have made it possible for me to be here at Villanova, especially John Scarpa, Father Dobbin, Dean Sargent and all you faculty members who worked so effectively to recruit not me—for me, the decision was easy—but my wife Jaime, a Sonoran desert flower from birth. What made the decision easy for me was the passion for the Catholic intellectual tradition that extraordinary teachers early awakened in me and have sustained over more than a quarter century. First there was Brother R. Columban F.S.C., the Christian Brother who in 1978 introduced young Patrick to the

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1. See CATECHISMUS CATHOLICAE ECCLESIAE Sec. 831 (1997).

thought of John Henry Newman. Now ninety years old, Brother Columban shows no sign of declaring my ignorance invincible. Next came Louis Dupré, who taught a college sophomore to value the thought of Father Bernard Lonergan S.J. So successful was Dupré, he effected a Jesuitical turn in my intellectual development that is rued even now by my wry Dominican friend and teacher Father Richard Schenk, who is here with us today. Lonergan's debt to Newman paved the way for me to embrace Lonergan's retrieval and development of the mind of Aquinas, and Dupré showed me how in Lonergan's, as in all authentically Catholic thought, nature must not be separated from grace. After college and then two years of graduate work in medieval philosophy, a special grace brought Professor Jack Coons and me together in Boalt Hall, where Jack eventually managed—I didn't make it easy—to teach me that we must believe that all of us equally can be *good* persons, however "hasty and awkward" Holmes (about whom, more later) might find us and our negative externalities. As no one else, Jack Coons discerns the mighty consequences for law and society of a belief that we already stand to one another as equals who are better than the homogenization that goes forward in the name of equalizing outcomes or opportunities. I thank Jack for it all, including his presence here today. (Who besides Jack Coons could survive having to educate two generations of Brennans?) After law school came a clerkship with Judge John Noonan, a chance to learn up close how a Catholic jurist works methodically to apply and develop rules in order to serve persons he knows to be created in God's image and likeness, the method inspired for Noonan by none other than Cardinal Newman. Finally, three other legal minds, especially Joseph Vining, John Witte and Thomas Kohler, have inspired me by the example of their work and fortified me through their friendship. The shortcomings in my work cannot be traced to a shortage of great teachers and scholars in my life.

I recall the first time I saw the advertisement for the John F. Scarpa Chair in Catholic Legal Studies—the admiration I felt for what Villanova was undertaking with John Scarpa's help, even the anticipatory envy of the person who would enjoy this estimable opportunity. Given my abiding concern to study the Catholic tradition—while drawing on the contributions of Protestant and non-Christian scholars—in order to identify and meet questions of law and politics of moment to us all, where better to work than in a passionate Augustinian community, an inclusive Catholic law school? Imagine then, if you will, the shock of surprise when, quite out of nowhere, my phone rang in Arizona and it was Dean Sargent calling to interest me in the Scarpa Chair, and then again when he called back to ask me to accept the Chair. I could not have dreamt up a better help to my work.

And there *is* work to be done, for the Catholic tradition, notwithstanding rumors to the contrary, is on the move. While Catholics believe that revelation ended with the death of the last apostle, they simultane-

ously insist that “insight grows into what has been handed down.”² Evolution happens whether we like it or not; insight occurs, and tradition and doctrine develop (rather than petrify or regress), only when minds care enough to work out the direction and the transitions. It is Catholic doctrine that some of what happens in human history depends on the success of humans’ probing, among other sources, the deposit of faith in hope of developing sound doctrine to live by in a changing world. A question on which Catholic doctrine has developed, with significance for how we view law and civil society and their role in history, concerns the relationship among grace, nature and capital “C” Catholicity. I shall postpone these questions of a theology of grace to the end, not because they are an unimportant afterthought, but exactly because they control the meaning of what comes before. First, I think, we must do what we can to get to know the persons—the human subjects—these doctrines concern, which brings me to my topic of who *we* are becoming.

The inauguration of this Chair in Catholic Legal Studies seems to offer an invitation, which I shall like to accept, to say something about a whole approach to law. What I have to say today is an encapsulation of some aspects of an overall project, which I am working out in many parts, that attempts to re-conceive (what we think of as) *the rule of law* along lines suggested by the foundational insights of Father Bernard Lonergan.³ Lonergan searched many subjects, but he barely touched law. The foundational insights he proffered, though, are full of legal promise; indeed, I deny that any generation can live—at least, not lawfully—without them. Though Lonergan is a helpful guide, we can live without him; what I mean by our needing his insights, if we are to live lawfully, will become clear as I proceed. To convey something of my overall project without compromising the party at Dundale Mansion, I must leave a lot out, even some fundamentals. We shall need examples, though, for the dialectic that ensures that the jurisprudence and law it invites are fit not for a Platonic heaven or a Panglossian utopia, but for this world that we inhabit and create. It is here that we fail or succeed in making ourselves into persons who are not merely technically competent (effective bureaucrats or clever lawyers), but responsible actors, indeed good lovers of one another in all our living. Unlike in Plato’s heaven, where the good abides fully wrought, in us, “the good is something under construction.”⁴ In aid of this construction, I pro-

2. SECOND VATICAN COUNCIL, CONSTITUTIO DOGMATICA DE DIVINA REVELATIONE (DEI VERBUM), par. 8 (“[C]rescit enim tam rerum quam verborum traditorum perceptio.”).

3. See, e.g., Patrick McKinley Brennan, *Meaning’s Edge, Love’s Priority*, 101 MICH. L. REV 2060 (2003) [hereinafter Brennan, *Meaning’s Edge*] (reviewing JAMES BOYD WHITE, *THE EDGE OF MEANING*); Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV 227 (2002) [hereinafter Brennan, *Realizing the Rule of Law*]. Forthcoming is a book tentatively titled *LAWFUL SUBJECTS: INSIDE THE RULE OF LAW*.

4. Flannery O’Connor, *A Memoir of Mary Ann*, in FLANNERY O’CONNOR: COLLECTED WORKS 830 (Sally Fitzgerald ed., 1988).

pose a rule of law inspired by (what I call) a *jurisprudence of intelligent subjectivity*, a jurisprudence that focuses on how we human *subjects* become lawful through the dynamic operations of our human *intelligence*. When law looks “largely irrelevant to the self,”⁵ as it can hardly help but do when our starting points are rules and regulations rather than ourselves in our potential for intelligence in action, law’s desuetude and disregard, and our own declension and decay, await little or no further explanation. When, in approaching norms with which to bind individuals and create community, we instead focus on “the inner experience of the subject who is involved in the event of discovering, accepting, and observing the law,”⁶ we are on the way to becoming good—or at least better—persons, even lawyers. Hence my title, *Law and Who We Are Becoming*.

I. GETTING TO THE SUBJECT

A. *Knowing Ourselves*

Some sixteen centuries ago, Saint Augustine of Hippo turned inward to know both God and the creature wrought in His image and likeness. More than a millennium later, Descartes deployed his “*cogito*” rather to distance the human subject from the divine order Augustine had fathomed with his “*proto-cogito*.”⁷ Kierkegaard in due course offered a corrective, but on the heels of it came Freud, who, suffice it to say, has been around long enough for us to kill and then resurrect him multiple times. This game has not yet seen its final season, and meanwhile we have grown more afraid to know ourselves. “‘Know thyself,’ we hear suggested to us for our own good. We hardly know ourselves,”⁸ observes Joseph Vining. Which is a problem for law, because, as Vining also observes, “[t]he question what the law ‘is’ is not so very different from the question what we ‘are’.”⁹ This is because—I shall argue—norms capable of binding human subjects at the level of intelligence are the product of the individual human subject’s, and the community’s collective, obedience to (what I shall call) *inner law*.¹⁰

5. KEVIN M. CROTTY, *LAW’S INTERIOR* 90 (2001).

6. LADISLAS ÖRSY, *THEOLOGY AND CANON LAW* 154 (1992).

7. See CHARLES TAYLOR, *SOURCES OF THE SELF* 132 (Harvard Univ. Press Reprint ed., 2002) (1989).

8. JOSEPH VINING, *FROM NEWTON’S SLEEP* 344 (1995).

9. *Id.* at 128 (emphasis added).

10. “Inner law” is my expression, but the phenomenology of human knowing worked out in this Part, though it quotes them sparingly, is drawn from the writings of Bernard Lonergan. The primary text is BERNARD J.F. LONERGAN, *INSIGHT: A STUDY OF HUMAN UNDERSTANDING* (1958) [hereinafter *INSIGHT*]; more compendious is Bernard Lonergan, *Cognitive Structure*, in 4 *COLLECTED WORKS OF BERNARD LONERGAN* 205 (Frederick E. Crowe & Robert M. Doran eds., Univ. of Toronto Press 1988) (1967). My understanding and presentation of Lonergan’s thought owe much more than I can trace to the secondary literature I have studied over nearly twenty years.

Rather than all at once, I shall come at inner law, and how it is already at work in us, in stages. The first point to observe is simply that *whatever* you are doing, whatever activity you are engaging in—whether it be dining, dancing, reading or even law—you bring to bear certain assumptions about how it is you know what it is you *do* know, or would *like* to know. These operative assumptions control, explicitly or implicitly, how you go about acquiring and sharing knowledge. Assuming (as I shall here) that we are not in the grip of a thoroughgoing determinism, the key to increasing success is to take *conscious* possession of the tools of your knowing. If neither knowing nor not-knowing is inevitable, then knowing how to know should be of some help.

Lest, on the basis of this call for knowing how we know, you conclude that I have embarked on a frolic and detour, consider that in medieval argument, angels who lacked bodies were believed to do what knowing they did through mighty powers of intellectual intuition. A footnote in the history of philosophy would add that Descartes's model of human knowing sounds rather more angelic than human.¹¹ But the footnote would not end there, because many, perhaps most notably the Scottish school of "Moral Sense," to which not only Charles Reid but also the more famous (or infamous?) Thomas Jefferson subscribed, have taught that what knowing we all do with respect to morals occurs thanks to a special faculty for intuition, a kind of occult sixth-sense. There are libraries packed with views on how we know what it is that we know. The pertinent point in this is that *these epistemologies do—and should—have social consequences*.¹² James Madison knew as much when he made Federalist Fifty-One an occasion to observe that we must rely on human rather than angelic means.¹³ If we are to succeed at this, we need to know how we human subjects function. If, for instance, you suppose you know thanks to God's whispering in your ear, you'll want to turn down the music and unstop your ears, so as not to make the Almighty raise His voice. If morals were known by intuition, ears and dialogue and dialectic would have no place in moral knowledge's entrance, nor would there exist the possibility of (fraternal) correction. Prescinding from the matters of grace reserved to the end, the only alternative to law that is grounded in a correct grasp of human intelligence is law that is beneath our intelligence. But taking a stand on intelligence requires getting to know who we really are. The barbarian, as John Courtney Murray observed, can wear a Brooks Brothers suit;¹⁴ he can hold a J.D., be admitted to the Order of the Coif, pursue a stunningly successful career in the highest places in the land, and never have heard of Delphi.

11. See DAVID TRACY, PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE 27 (1987).

12. On the current, pervasive mismatch between law and its avowed presuppositions, see STEVEN SMITH, LAW'S QUANDARY (2004).

13. See THE FEDERALIST NO. 51 (James Madison).

14. See JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS 12 (1960).

The second point to observe is that if you come to know anything at all, this is because you are curious. If you utterly lacked a spirit of inquiry, you would know nothing. Please note: I do not say that you would *experience* nothing. While you are alive, you cannot avoid experience; but experiencing is not knowing. I strike my foot against a stone and it hurts; it's another thing to know what is happening. I look at the newspaper in search of palindromes; to know the words' and sentences' meanings is to do something else. Knowledge follows experience only if one is curious (and creative) enough to make it happen. Witness the *true* story of an American wending his way through the British Museum. Reaching the Rosetta Stone, he reached right over the railing (this was back when they still had a railing that you could reach right over), touched the scarred old slab, and lamented: "It doesn't *feel* meaningful." Whereupon an old Briton was heard to mumble: "The poor American's got this old thing confused with the Blarney Stone."¹⁵ The American experienced the stone but he missed knowing its meaning; he touched and gawked, and this mere experiencing was as close to knowing as he got. He needed first to be genuinely, not just idly, curious.

The third point to note, then, is that we are not curious in a vacuum. What we question, we first *experienced*. By "experience" I mean the sensory flow, constant while I am awake, of my sensing as well as my imagining, feeling and remembering. Whether I like it or not, through my neurophysiological structures I am steadily experiencing sights, sounds, smells, memories and so forth. The contents of the sensory flow are for me givens—"data" in the root sense of that word. Letting my curiosity operate, I am *attentive* to the data of experience.

Fourth, even this *attentive* experiencing is not knowing. If attending to the data of my experiencing made me a knower, there would be no point to questioning them. But I do question them, and to my questioning there is a point. When I ask, "What is it? What does it mean?," the question is heuristic; it undertakes to discover something in the givens. Merely gawking at or touching the Rosetta Stone, I'm not going to know anything, let alone its meaning. Once I question what I experienced, I'm on the way to knowing something.

Fifth, the next stage on the way to knowing something is *answering* the "What is it? What does it mean?" question. The answer is not yet knowledge. The answer is an interpretation of the data; it is, in other words, a proposal of what intelligibility may lie latent in the data. Before people rediscovered the meaning of hieroglyphs, thanks to the Rosetta Stone, many interpretations were tried and rejected. Not just any interpretation will do, but often it takes time to hit upon the right one. We need to be *intelligent* about our experience; we need to be creative, insightful in our interpreting. The genius should have a better time of it than the dullard.

15. See Brennan, *Meaning's Edge*, *supra* note 3, at 2060.

In any event, our interpretations—these potential intelligibilities—are ideas in need of verification.

So, sixth, we question our interpretations to determine whether they are correct. Questioning our experience led to a bright idea, the interpretation; now we ask whether our bright idea is a true idea. We ask, “Is it so? Is this *in fact* what hieroglyphs mean?” The answer to this question is not another bright (or dim) idea. The answer is a *judgment*, the human subject’s determination that the evidence is sufficient to support his interpretation, his proposal of what intelligibility was latent in the data. The judgment is nothing other than his *personal commitment* to the sufficiency of the evidence to support his judgment. But if the judgment is properly taken, this is because the subject has, with respect to the experience in question, *satisfied the desire to know*. The claim here is not that in reaching a judgment you become possessed of “justified belief” or an “opinion”—as though that’s the best we humans can do. No, the claim is that when you judge that the evidence is sufficient to support your prospective judgment (your interpretation), you become a knower.

Of course, if there remain nagging questions about the sufficiency of the evidence, you cannot reach knowledge; likewise, if bias prevents you from letting all relevant questions occur, you cannot reach knowledge of the thing. In either situation, the best you can do is to judge consistent with what evidence you have, and this might be to say that you do not know or that “x” is “probably” so. You can *always* judge; even if you do not understand the data, even if your interpretation fails, you can say that you do not understand, and that is itself a judgment.¹⁶ You can always constrict the field of prospective judgment to what you do know. However, when you can and do make the personal commitment that there are no further relevant questions, that the evidence supports your understanding (interpretation), then you can reach (what Lonergan refers to as) a “limited absolute.”¹⁷ By *satisfying* the desire to know, we become knowers. But if we fail to question our experience, or omit to question our interpretations of it, or “judge” without regard to the inner law that is the desire to know, our lawlessness has confusion and ignorance as its consequence. Of this, the poor man stymied by the Rosetta Stone is Exhibit A. Daily life and world history teem with less benign examples.

What I have been suggesting is how knowing is not some simple, unitary act, but is instead the compound of structured acts of experiencing, understanding and then judging according to the standard set by the detached, disinterested, unrestricted desire to know. This perhaps innocuous-seeming thesis—that knowing is not looking, but instead involves a series of irreducibly different acts governed by inner law—conditions all that will follow here. Inasmuch as knowing requires the success of several

16. See JOSEPH FLANAGAN, *QUEST FOR SELF-KNOWLEDGE: AN ESSAY IN LONERGAN’S PHILOSOPHY* 125 (1997).

17. See *id.* at 136–37.

different kinds of acts, those who would say what the law is and give it effect must become skilled at those several acts. If the jurists in the Brooks Brothers suits are operating at the level of human intelligence in their practice of law, they will be *attentive* experiencers, *intelligent* interpreters of experience and *reasonable* judges of the sufficiency of the evidence for their interpretations. Merely rolling the eyes of the mind would be easier, if only it were possible; what is called for is the cultivation of the personal characteristics that allow for making the personal commitment that respects inner law.

If you are not already disposed, thanks to earlier introspection and reflection, to grant my claim about knowing's being a compound of structured and related operations, nothing I can say here will change your mind. But the idea is, as they say, on the table; and it won't go away. If you feel a kind of skepticism welling up within, permit me, before proceeding, to put a question to you. Are you a knower? My question, you will notice, does not ask whether you know some *thing*. The question concerns not what but *whether* you know. Are *you* a knower? You might not be, in which case you will have nothing to say, because you will not have understood, among other things, my question. But, if you answer "yes" or "no," "maybe" or "maybe not," you *are* a knower. Why? Because you could not answer if you had not first known. Not only that. The fact of your response is itself evidence that you know through the pattern of acts I have described. Why? Because in the process of responding to my question, at the very least in hearing the sounds of my speaking, you will have experienced; through questioning that experience and trying to understand my meaning, you will have reached an interpretation of the meaning of those sounds leaving my mouth and reaching your ears; and, questioning that interpretation and concluding whether the evidence was sufficient to support it, you will have judged.

B. *Knowing and Realizing Value*

So far I have considered inner law as it governs knowing what is. We are not just knowers, however; we are also doers. And our doing is not necessarily undirected, or directed only to the extent of our knowledge of what exists. No, the desire to know extends itself beyond knowledge of what *is*, to knowledge of what *can be*. We can know what is valuable, what is worth our doing. And we know what is worth doing in basically the same way as we know what is. Knowing occurs in the judgment that, as to the matter in question, satisfies the pure question. "Judgments of value differ in content but not in structure from judgments of fact."¹⁸ Judgments of value do differ from judgments of fact inasmuch as our feelings can help us apprehend the valuable, but our feelings are not themselves judgments (of value); and until we judge, we do not know. Judgments of value go beyond what is, to what it would be truly good or better to bring into

18. BERNARD LONERGAN, *METHOD IN THEOLOGY* 37 (1972).

being. Deciding to act to instantiate the good, the valuable, is to be *responsible*.¹⁹

Our culture of ethical non-cognitivism freights inquiry into how we know the good or valuable with a burden that is impossible to meet from a podium. David Hume's echo can deafen us to the emergence of the ought that is part of who we already are. But a start, perhaps, is to appeal to your own honest efforts to take possession of how you are already conducting your successful knowing, deciding, and doing. The obscurantist about matters of fact mistakes the real for the unreal; the bungler about matters of choice and value brings into existence a person who is actualizing the unvaluable. Are you indifferent as between the valuable and the unvaluable? Do you really believe yourself incapable of ever judging correctly value or its absence? Later, at Dundale Mansion, will you be indifferent as between enjoying Beef Wellington (or sushi) and good conversation, on the one hand, and, say, being bored into submission by your most tiresome colleague, on the other? I doubt it. "One's judgments of value are revealed as the door to one's fulfillment or to one's loss."²⁰ *Successful performance grounds, and should control, theory.*

Rather than belabor this point, I want now to turn to how inner law begins to unfold itself into norms that, with the benefit of coercive enforcement, govern individuals and their communities—the proximate concern of lawyers' work. A starting point is the Scholastics' insight that what is good, always is particular. The judgment of value must be a judgment of what is concretely good, because what is good merely in the abstract might be devastating in the particular case. But though judgments of value must be judgments of the particulars, the good (what is valuable for humans to realize) is not limited to the vital values that are good for humans one by one. The human good is not only individual; it is also social. Humans operate to realize individual goods, as when Adam who is hungry and alone picks a tangerine from a tree and feeds himself without Eve's notoriously able assistance. Humans also cooperate; they work together to realize both individual and social goods. The manner in which cooperation is working itself out, Lonergan referred to as the *good of order*; it is the concrete structure of human interaction by which certain individual and social goods are realized.²¹ A system of distribution that gets bread to those who need it, when they need it, is, to that extent, a good of order. A legal system that sees that only the culpable are punished is, to that extent, a good of order.

An elusive aspect of goods of order is that we humans are not related to them by our feelings. Feeling hungry, we are on the way to knowing whether, when, what, how it would be good to eat; but we do not hunger,

19. For an insightful summary of Lonergan's ethics, see Frederick Crowe, *An Exploration of Lonergan's New Notion of Value*, in *APPROPRIATING THE LONERGAN IDEA* 51 (Michael Vertin ed., 1989).

20. LONERGAN, *supra* note 18, at 39.

21. See LONERGAN, *supra* note 10, at 596–97.

except metaphorically, for goods of order. The goodness and value of cooperative regimes must be apprehended and known without the help (or hindrance) of feelings; they are pure intelligibilities, reached on the level of judgment, and were only latent in mere experience. Affirming that knowing is a matter of correct understanding, in judgment, of the intelligibility in what is given in experience, we can be at home with what is lost on the empiricist who mistakes mere experiencing for knowing. Judging, for instance, that everyone's eating regularly is a good, we are in a position to determine to (try to) bring into being not just individual goods, but also the good of order that proliferates and protects such individual goods. A legal system that contributes to realizing valuable ways of living, as by enforcing (just) contracts for the baking and distribution of bread, is *pro tanto* a good of order.

Returning, now, from goods of order to the desire to know that makes their discovery possible, I want to urge again, before turning to some of the contours of a rule of law indicated by a jurisprudence of intelligent subjectivity, that we should regard the detached, disinterested, unrestricted desire to know as *inner law*. This unconventional usage will rankle especially in the ears of those who crave or already stipulate a univocal definition of law. Such shock therapy is desirable inasmuch as it drives home the unexpected point that "prior to the criteria of truth invented by philosophers," or even lawyers, "there is the dynamic criterion of the further question immanent in intelligence itself."²² In Lonergan's idiom, "the pure question"²³—the detached, disinterested, unrestricted drive to know that has as its object all of reality and value—constitutes us as who we are and can become. Because it is the norm to which all other human norms must conform, recognizing it as *inner law* strikes me as eminently clarifying. We are committed to a world of fact, not by first knowing,

what it is and that it is worth while, but by an inability to avoid experience, by the subtle conquest in us of the Eros that would understand, by the inevitable aftermath of that sweet adventure when a rationality identical with us demands the absolute, . . . and, when [it] is attained, imposes upon us a commitment in which we bow to an immanent Anagke.²⁴

In other words, we become lawful, if at all, from the inside out, by obedience to the laws of the human spirit working itself out in knowing and choosing.²⁵

Do not get me wrong; Lonergan's rhapsodic prose cannot obscure that we are guilty of much less. However, unvarnished silliness is not a concrete possibility, at least not for long. I once talked to a group of law-

22. *Id.* at 221.

23. *See id.* at 9 (describing elements of "pure question").

24. *Id.* at 331.

25. *See id.* at 618.

yers about how to interpret statutes. The post-lecture discussion began with a rankled hearer's blurting out, "I didn't understand a word you said." This would have been unfortunate, but the would-be intellectual terrorist at once proceeded to withdraw his own sting by delivering a soliloquy demonstrating to all present that he understood perfectly well.²⁶ "One may be willing to play the buffoon, but one wants to do it intelligently."²⁷ And this *fact*, though more modest than a Platonic Form, has the advantage of being a *real* rock on which to build a jurisprudence and, thence, a rule of law fit for (potentially) intelligent human subjects.

II. TOWARD A RULE OF LAW OF INTELLIGENT SUBJECTIVITY

A. *Getting Methodical*

The application of force "in the name of the law" may turn out to be necessary, but unless we are to be as blunt as the force others' unwillingness to be intelligent calls forth, first we ourselves must be intelligent—for, as Lonergan muses, "Is everyone to use force against everyone to convince everyone that force is beside the point?"²⁸ We cannot make people be intelligent, but we can, at least in the first instance or the second, appeal to their intelligence, recognizing that the surd already lodged in the situation may call for or await other solutions.²⁹ Responsibility—intelligence in deciding and acting—entails creating structures and systems that can create and give effect to binding norms that order our living toward discovering and instantiating values. By law, we mean and should mean—though we often say other things instead—norms of conduct, aimed toward values, capable of coercive enforcement in the community. What I would like to sketch in what follows is something of the rule of law that is indicated by the jurisprudence which takes its stand on the desire to know.

The foundation of such a legal undertaking is its *commitment to method*. Results matter, of course, but method, as I shall describe it, is—with the exception I reserve to the end—what makes the right results possible and then actual. There is risk that my emphasis on method will mislead. We offer first-year law courses in legal method; we offer upper-level courses in the venerated "legal process" of Hart and Saks; we talk about method in law the way we talk about the weather, never quite sure how much or little there is to talk about and how it matters anyway. My particular trouble with method or process as lawyers usually talk about it is that, while to some extent it has received its shape and structure from the methodical character of intelligent subjectivity itself (a fact pursued by Mary Ann

26. See Brennan, *Realizing the Rule of Law*, *supra* note 3, at 228.

27. Bernard Lonergan, *Philosophical Positions with Regard to Knowing*, in 6 COLLECTED WORKS OF BERNARD LONERGAN: PHILOSOPHICAL AND THEOLOGICAL PAPERS 1958–1964 221, 224 (Robert C. Croken et al. ed., 1996).

28. Lonergan, *supra* note 10, at 632.

29. On the place of grace and love in transforming possibilities, see *infra*, Part III.

Glendon)³⁰, rarely have its proponents understood that (with that exception to which we shall come at the end) *only* to the extent that it is so shaped and structured, is it capable of binding subjects at the level of intelligence.

I called attention, in Part I, to human intelligence as a dynamic compound of several irreducibly different, but functionally united and structured operations. We must experience before we can understand, we must understand before we can judge, and so forth. If knowledge is to enter, we must progress from one operation to the next—and inner law bids us do so. The pattern of operations that lead to correct judgment is *normative*, for it reveals that it is, indeed, the way to satisfy the unalienable desire to know. But though knowledge enters one judgment at a time, judgments can build on and correct those that have come before. To borrow a line from Lonergan: “The wheel of method not only turns but also rolls along.”³¹ The results of methodical inquiry cumulate and progress. Such “results set a standard, and because the standard is met, the pattern of related operations is normative: it is the right way to get the job done.”³² Method turns out to be a normative pattern of related and recurrent operations that generate cumulative and progressive results.³³ Bernard Lonergan, from whom I learned to think about method this way, learned about method from the pattern of structured operations pursued by empirical scientists, what we refer to as “scientific method.” One of Lonergan’s particular contributions was to point out that the structured pattern of operations performed by the natural scientist is in fact but one application of the invariant pattern by which *any* knowledge—subject to the exception reserved to the end—enters. Most especially, Lonergan observed that not just our knowing, but our deciding how to live, depends upon our acceding to the normativity of cognitive method. Not just ethics, but the goods of order it calls forth, will be methodical—if, that is, they are to square with intelligence, the dynamic pattern of structured operations by which knowledge enters.

I have conditioned the emergence of a rule of law on its being the achievement of persons engaged in methodically seeking valuable ways of living, and, as I have just suggested, an aspect of being methodical is differentiating and specializing. Subjects intelligently engaged in the life business of setting up structures and orders for human living, including the good of order we refer to as a legal system, will give primacy to method,

30. See MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY, 231 (1994); Mary Ann Glendon, *Knowledge Makes a Noisy Entrance: The Struggle for Self-Appropriation in the Law*, in 10 LONERGAN WORKSHOP 119 (Fred Lawrence ed., 1993).

31. LONERGAN, *supra* note 18, at 5.

32. Bernard J.F. Lonergan, *Religious Knowledge*, in A THIRD COLLECTION: PAPERS BY BERNARD J.F. LONERGAN 129, 140 (Frederick E. Crowe ed., 1985) [hereinafter PAPERS BY LONERGAN].

33. See *id.*

using it to confirm and to correct and to add to the results of previous applications of that method. Rooting our undertakings in method is only a beginning, however. To deliver the specialized knowledge we need, method will have to be particularized. Successful biologists and chemists, for example, are united in the use of scientific method and divided by the ways that they particularize that method. With respect to human living, the same basic method applies to figuring out how to create and run a family as to how to create and run the polis, but those who try to run a polis without more sophisticated particularizations and specifications of method than we find in a successful household will produce a spectacularly disappointing city. Successful cities are made, in part, by the methodical contributions and cooperation of engineers, economists and architects. Families can thrive without them, though, of course, no family can truly thrive if the larger landscape of which it is a part is run clumsily. A legal system shaped by a jurisprudence of subjectivity would respect the need for, and conditions for obtaining, specialized knowledge—without disrespecting the fact that in law we are after truly valuable, not merely efficient, human living. I would observe in passing that Lonergan is one of the too few exceptions to Catholic thinkers' slighting economic analysis; Lonergan insists upon careful and systematic attention to the conditions of the possibility of increase in human living.³⁴ Common sense must not be allowed to prevent specialization; specialists must not lose sight of their service to valuable human living.

B. *Jurisdiction, Text, and Authority*

A second aspect of a jurisprudence of a rule of law of intelligent subjectivity (the first was the primacy of method and the correlative need to specialize in service of pursuing the good) follows at once from the first. Questions of jurisdiction, questions of who can (or must) do what in the name of the law, will be decided on the basis of competence, the capability of getting the job done under the circumstances that obtain. *Of course*, jurisdiction as it has been and is being worked out in our federal system does indeed reflect judgments of competence; the courts frequently talk this way (as when they give effect to a congressional delegation to an agency), and so sometimes does the Congress (as when it determines to attempt such a delegation). But most of the time, missing in what we hear and what we can infer about what is really going on, is recognition that claims of jurisdiction contribute to a system that can bind at the level of intelligence only to the extent that they contribute to the methodical seeking and implementing of valuable ways of living. We are too used to the idea that the sufficient purpose and justification for parceling out power

34. See, e.g., 15 BERNARD J.F. LONERGAN, COLLECTED WORKS OF BERNARD LONERGAN: MACROECONOMIC DYNAMICS: AN ESSAY IN CIRCULATION ANALYSIS (Frederick G. Lawrence et al., ed., 1999); 21 BERNARD J.F. LONERGAN, COLLECTED WORKS OF BERNARD LONERGAN: FOR A NEW POLITICAL ECONOMY (Philip J. McShane ed., 1998).

is, through “checks and balances,” to prevent its balkanization, to keep the lonely Liberal rights-bearer free from government intrusion.³⁵ Jurisdiction’s legitimacy derives exactly from its contributing to a methodical and adequately specialized system of seeking and implementing valuable ways of living, with the question of what checks-and-balances are needful being a subordinate issue.³⁶ What we must be about when we devise and deploy species of jurisdiction is the creation of conditions that render it more probable that those possessed of the power of such jurisdiction can speak and act with the *authority* that is the antecedent of the obedience of intelligence.

There is more to say about authority, but first I need to turn to a third aspect of the rule of law indicated by a jurisprudence of human subjectivity, concerning “interpretation” and the texts that get “interpreted” in the name of the law. If I have taken rather long to say something about texts and interpretation, the reason for my reserve is simple: We cannot intelligently approach the question of who should do what with which texts in the name of the law unless we first know who these actors are and what they are up to and whence they receive their warrant. What we have seen is that humans are subjects who learn progressively and cumulatively, and that their learning, both about what *is* and about what is *valuable*, is propelled and governed by inner law. Now, everyone knows that texts are neither self-justifying nor self-interpreting, not even in law; they depend on subjects to perform these acts. What we must add is that subjects, if they are to perform these acts responsibly, must be doing so as a part of a methodical pursuit and instantiation of valuable ways of living.

There is a familiar trend in American jurisprudence and legal practice to insist that only texts (rather than, say, legislative intent) contain evidence of what the law is and, coordinately, to constrict the list of (kinds of) texts that can be consulted, a reaction against an earlier generation’s finding first statutory,³⁷ and then constitutional,³⁸ law in the “penumbra” of what had been written down. This reactionary trend is a case in point in David Tracy’s claim that “when literate cultures are in crisis, the crisis is most evident in what they do with their exemplary written texts.”³⁹ So it is, as Mary Ann Glendon observes, that “our legal culture *also* explains why

35. See, e.g., BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 35 (1994).

36. A growing body of legal scholarship seeks to re-shape law’s institutions and the jurisdiction that creates them in light of new learning about what, as an empirical matter, institutions do well. See, e.g., Cass R. Sunstein and Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003). A defect of much of this new scholarship is its exclusively economics-driven notion of value.

37. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957) (finding sources of federal common law “in the penumbra of express statutory mandates”).

38. See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (perceiving legal “penumbras, formed by emanations”).

39. TRACY, *supra* note 11, at 11.

many American friends of democratic and rule-of-law values have been driven to espouse what most civil lawyers would regard as excessively rigid forms of textualism.”⁴⁰ From there, though, we can go on to observe that the self-styled “textualists” on the Supreme Court are in the majority in such cases as *Seminole Tribe of Florida v. Florida*⁴¹ and *Alden v. Maine*,⁴² where, in answering questions about the states’ suability, they proceed not on the basis of the text of the Eleventh Amendment to the U.S. Constitution or any other isolable constitutional text, but instead (as Justice Kennedy says in his majority opinion in *Alden*), “[i]n light of history, practice, precedent, and the structure of the Constitution.”⁴³ Justice Souter’s dissent in *Alden* begins by noting that the majority had to confront the fact that, for its purpose of disallowing Congress from abrogating the states’ immunity in their own courts, “the Eleventh Amendment”—the constitutional text previously invoked as the textual anchor of state sovereign immunity—was simply “beside the point.”⁴⁴ If text is what matters, at least in *Marbury v. Madison*,⁴⁵ Chief Justice Marshall, after his lugubrious essay on the nature of written constitutions *in general*, found that “the peculiar expressions of the constitution of the United States furnish additional arguments in favor of” where the case was already headed.⁴⁶ But both Marshall in *Marbury* and the majorities in *Seminole* and *Alden* are right that text, even the text of the Constitution, is one among an unspecified range of sources that can properly be consulted by those charged with saying what the law is and then acting in the name of the law.⁴⁷

Situating the process and method of interpreting text within the larger arena of legal practice shaped by inner law is the critical, legitimating move. Sure enough, one can approach the phenomenon of law as a sociologist (after the manner of H.L.A. Hart), say, in which case one is not doing law but instead something else, where the aim is to edify, not to decide and act. But when one is *doing* law, one is deciding how others or one’s very self shall live and who we shall become. Joseph Vining catches this with his customary elegance and insight:

40. Mary Ann Glendon, *Comment to Antonin Scalia, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 95, 113 (Amy Gutmann ed., 1997).

41. 517 U.S. 44, 47 (1996).

42. 527 U.S. 706 (1999).

43. *Id.* at 754.

44. *See id.* at 760–62 (Souter, J., dissenting).

45. 5 U.S. 137, 175–80 (1803).

46. *Id.* at 178.

47. I here take no position on the result in either *Seminole* or *Alden*. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 75–76 (1996) (holding Congress lacks power under Article I of the Constitution to abrogate the States’ sovereign immunity from private suits commenced or prosecuted in Article III courts); *Alden*, 527 U.S. at 712 (holding “[P]owers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.”).

There is always, in law, a decision maker, and what are called rules in law are expressions of considerations to be taken into account by a decision maker. They focus not on themselves as a self-contained system but upon decision-making activity pointing forward. Talk of rights and rules of a static kind, projecting an image of law standing off by itself, obscures the focus that legal rules have in fact, always a decision that must be made, at the edge of lives that have not been lived before, in a world that has not been seen before.⁴⁸

The act of interpretation that precedes such decision-making, along with the structures supporting it, must proceed according to method. And so, for example, instead of imagining that the *responsible* judge's job could be a simple-minded, almost algorithmic act of giving effect to text, we will insist that in law the interpreting of texts be pursued as part of a larger effort, called for by inner law, to gather data about valuable ways of living, understand and judge them, and give effect to them in an orderly and ongoing way. This is called for not by a decision of "policy," but by who we *are*, for this is how doctrines worthy of our intelligence develop here, in the absence of angelic abilities. Relatedly, the structure of our intelligence in action will indicate that "interpretation" be approached in view of the necessary personal characteristics, particularly the role of creativity in reaching "the limited absolute," or at least the judgment of probable meaning.⁴⁹ Legal knowledge, in short, is neither more nor less than the particular fruit of subjects who have mastered their intelligence. The need of this mastery will be very disappointing to those anticipating easy absolutes and certainties, and lots of them, in law. Enlightenment hopes of pure reason are dashed on the discovery that the methodical asking and answering of questions is not epiphenomenal to, but is constitutive of us and of our worthy human living.⁵⁰

C. *Positivity and Reception*

What does this dynamic, open-ended rule of law mean for legal positivism, the view (roughly) that law (or its sources) is limited to what has been posited by the authoritative body (or bodies)? While we sometimes hear that positivism amounts only to an English invention of the nine-

48. JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* 218 (1986).

49. For a compendious treatment of what intelligence requires in the way of hermeneutics in general, much of which is relevant to a specifically legal hermeneutics, see Quentin Quesnell, *Mutual Misunderstanding: The Dialectic of Contemporary Hermeneutics*, in LONERGAN'S HERMENEUTICS: ITS DEVELOPMENT AND APPLICATION 19 (Sean E. McEvenue & Ben F. Meyer eds., 1989).

50. If you hear in this dialogical, discursive, or "conversational" model of law and politics echoes of John Courtney Murray's "*conversatio civilis*," recall that Murray borrowed much of his epistemology from his fellow-Jesuit Bernard Lonergan. See generally J. LEON HOOPER S.J., *THE ETHICS OF DISCOURSE: THE SOCIAL PHILOSOPHY OF JOHN COURTNEY MURRAY* (1986).

teenth century, and is rightly opposed by anyone at all sympathetic to natural law, the historical claim is false and the opposition in need of precision. Positivity, as a concept structuring *reflection* on law, seems to have been first articulated in about 1130 by the theological humanists of Paris and Chartres,⁵¹ and in the next century was developed by St. Thomas Aquinas, on whose side it is *almost* always better to stand. St. Thomas advances a positivist thesis for those *reflecting* on law. St. Thomas also advances a positivist thesis as a norm for those *doing* law, but one that is *instructively* circumscribed. I can only scratch the surface, but what is revealed is enough for the present purpose.

Borrowing a distinction advanced by Aristotle in the *Nicomachean Ethics*, St. Thomas asks whether we should prefer to be governed by animate justice or by inanimate justice. Animate justice here refers to the justice brought about by the virtuous person, whose virtue, rather than any inanimate law or *lex scripta*, produces a correct judgment of justice. St. Thomas answers that *ideally* we should prefer rule by animate justice, but *prudentially* we must prefer that all things be governed by inanimate justice—ordinarily, written law. Instructively, Aquinas's analysis does not proceed from any fundamental commitment about human law's being only what is written down, nor, for that matter, does he proceed from essentialist claims about the necessary role of judge or legislator or other officeholder. The controlling question, for St. Thomas, is how to secure justice—how, in other words, to make the natural law effective, or, in the terms that I have been using, how to use government to increase the probability that persons are finding and instantiating valuable ways of living.⁵² Further, according to St. Thomas, *ex natura*, from nature, no one holds the office of making and enforcing law for the community.⁵³ It falls to the community, as a requirement of inner law working itself out, to create or recognize offices, repositories of jurisdiction. What gives those offices and their products and agents *authority* is their being both directed to and successful at realizing valuable living for the community.⁵⁴

If this is so, the Thomistic definition of law, which I paraphrase as 'an ordinance of reason, for the common good, promulgated by the one who has charge of the community,' must be emended or at least amended.⁵⁵ Under the traditional definition, the lawgiver's promulgated ordinance can be "law" without regard to whether that ordinance has in fact been *received* by the community. Contemporary American thinking focuses on

51. See John Finnis, *The Truth in Legal Positivism*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 195 (Robert P. George ed., 1996).

52. See RUSSELL HITTINGER, *THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD* 72–75, 101–02 (2003).

53. See *id.* at 76–77 (noting St. Thomas "does not believe that anyone has the authority of judgment from the natural law itself").

54. The idiom is somewhat different, but see *id.* at 97–112.

55. See ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* Ia-IIae q.90, art. 1–4 (San Paolo ed., 1962) (1273).

our law-producing courts, especially the Supreme Court, as the oracular generators of welcome or dreaded law, with precious little attention to the (legal) significance of the non-reception of such decisions. In some instances, those decisions may in fact fail the test of being "of reason." But the point that interests me here is that if we approach the question of law from the point of view of human subjects in the process of becoming lawful, we cannot ignore whether the promulgation of the court (or the legislator) is in fact *moving* them to act—actively contributing to who they are becoming. A promulgated norm that has little or no role in actually making the community lawful is "law" in only a diminished sense.

This is because law, by doing what is in its nature to do, points to values and (thus) guides conduct. Father Ladislav Ōrsy makes this point, and adds a critical clarification, in his observation that "reception *by the community* belongs to the fullness of the law."⁵⁶ The reception of the law by individuals has not only the effect of shaping individuals but, in doing so, of creating a *community* of persons united in the active pursuit, discovery, and realization of certain kinds of values. The compound nature of human cognition has consequences for community. Community of one sort results from people's sharing experience; community of another sort results from people's sharing understandings of their common experience; yet another kind of community results when people of shared understandings also share the same judgments; and still another sort of community results from people's valuing and acting in common ways.⁵⁷ If a legislature passes a statute allowing tax credits to those who give money to private (including religious) schools, then we become individuals *and* a community of people actively supporting private (including religious) schools inasmuch as we receive and act on that statute. The extent to which this is a worthwhile turn, for individuals or the particular community, is contingent on many variables; what is not contingent is that when (putative) law is received and acted upon, it changes who we are, individually and communally.

D. Culture

But if, as I have suggested, reception by the community belongs to the fullness of law, and law has a benign and necessary office in our living responsibly—still, pan-jurism is to be avoided. Law is "the one principal cultural component we [Americans] all have in common," but law is only one part of culture.⁵⁸ By culture, I mean not just "high culture" (most things Florentine and all things by Evelyn Waugh), but rather the set of

56. LADISLAS ŌRSY, *THEOLOGY AND CANON LAW: NEW HORIZONS FOR LEGISLATION AND INTERPRETATION* 85 (1992) (emphasis added).

57. See Thomas C. Kohler, *The Integrity of Unrestricted Desire: Community, Values, and the Problem of Personhood*, in *AUTONOMY AND ORDER: A COMMUNITARIAN ANTHOLOGY* 61–65 (Edward Lehman ed., 2000).

58. Francis George, *Law and Culture in the United States*, 48 AM. J. JURIS. 131, 135 (2000).

reasons and values we have for action. Marriage and family are obvious and embattled examples. Sometimes it is said (as by John Finnis) that upon these law “supervenes,” giving what were already held to be valuable ways of living the imprimatur and form of law.⁵⁹ This seems true, but I would shift the emphasis. Sometimes, out of the very pursuit of valuable ways of living, law is generated on the basis of an authoritative judgment that a coercive and binding norm is necessary or desirable for the community or some of its members to realize such ways of living. Because legal norms point to, and order, our lives toward valuable ways of living, to the extent that our culture mistakes values or pursues a studied agnosticism regarding what is valuable, our (putatively) legal norms will lack what it takes to bind our intelligence.⁶⁰ When culture carries mistakes about, or communicates indifference to, valuable ways of living, law’s source and predicate are lacking.

What our American culture (as I read it) denies more and more is that cultures themselves, including that part of culture that is law, “may be judged valuable [exactly] insofar as they set the conditions under which authentic knowers and choosers . . . value themselves *precisely* as knowers and choosers.”⁶¹ When above I urged that “the pure question” is inner law, the idea was that in *all* our living we reach out, as best we can, to the real and the valuable. To be sure, we must expect disagreement and must, therefore, make respectful room for persons and ideas with which we disagree. What we cannot do, without violating inner law, is meet some questions arbitrarily. “Negatively, . . . the unrestricted desire excludes the unintelligent and uncritical rejection of any question, and positively the unrestricted desire demands the intelligent and critical handling of every question.”⁶² This is a tall order. Thus, we cannot tolerate or survive in a culture that undermines the conditions of the possibility of our being (communal) seekers, knowers, and realizers of value.

The undermining contribution of the notorious “Mystery Passage” in *Planned Parenthood v. Casey*⁶³ is to say that the “heart” of liberty as protected by our constitutional law is the “right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁶⁴ In place of the obligation to search freely for and instantiate the valuable, is proffered the unfettered right to self-assertion. Lost, in the theory at least, is recognition that seekers of meaning and value cannot long survive a culture that denies the integrity of their strivings. As human subjects absorb the cultural vision of *Casey*, they lose the capacity to embrace meaning and value, including law’s, as true. As Cardinal Francis George observes, in the world of pure subjective autonomy and assertion:

59. *See id.* at 139.

60. *See id. passim.*

61. FLANAGAN, *supra* note 16, at 200 (emphasis added).

62. INSIGHT *supra* note 10, at 638.

63. 505 U.S. 833 (1992).

64. *Id.* at 851.

[W]here freedom is not a property of persons but precedes them, the law can only be experienced as an unintelligible restraint. In place of free cooperation of persons according to the law, we can see—in the degraded world of *Casey*—nothing higher than mere compliance with law, and the scene ranges down to sullen conformity, a series of listless performances, subjugation to another's will.⁶⁵

In such a cultural climate, people:

[H]ave to pay a double price for their personal attainment of authenticity. Not only have they to undo their own lapses from righteousness but more grievously they have to discover what is wrong in the [cultural] tradition they have inherited and they have to struggle against the massive undertow it sets.⁶⁶

Few are capable of so much, and so it is that a society in decline digs its collective grave with arresting efficiency. Reversal may await the coming of prophet or saint.

E. *Correcting the Criminal Law*

Let me move toward my conclusion by spelling out where, in my judgment, “valu[ing] ourselves precisely as knowers and choosers” leads on a concrete question concerning Anglo-American criminal law.⁶⁷ In that memorable language of *The Common Law*, of which I quoted a phrase at the beginning, Oliver Wendell Holmes, Jr., opines that:

[I]f, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.⁶⁸

As a descriptive matter, little has changed since Holmes wrote; at least for the most part, our courts *do* decline to take the defendant's personal equation into account. And, at least when criminal condemnation and punishment are at issue, it seems to me that this cannot be justified, unless for a reason to which I shall come in a moment.

65. George, *supra* note 58, at 146.

66. PAPERS BY LONERGAN, *supra* note 32, at 121.

67. See Patrick McKinley Brennan, *On What Sin (and Grace) Can Teach Crime*, 5 PUNISHMENT & SOC'Y 347 (2003) (pursuing “Catholic criminal law” analysis; issue guest-edited by Jeffrie G. Murphy and Patrick McKinley Brennan).

68. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 108 (1881).

On the view I have sketched here, what is asked of us is that we let questions occur, seek as best we can to answer them, and then—making proper provision for tolerable disagreement—live by the results. While reserving ample room for the occasional splash of supererogation (in the performance of prophet, saint, or unassuming neighbor), we might say that what is asked of us is that we be *diligent* seekers of the good. In English, “diligence” is a dry word, but less so if we recall that its Latin root is “*diligere*,” which means to love or to care about (as in Augustine’s and others’ imperative, “*dilige et fac quod vis*,” which means, love and do what you will). As I intend it here, diligence is the requirement, set by inner law, that one be—as much as possible—attentive, intelligent, reasonable, and responsible. In contrast to a regime of cosmic strict liability, the standard of diligence looks to the concrete particulars of the person; it takes full account of the fact that there are forces that limit or block a person’s capacity to let questions occur. Some are genetic, others psychological, and still others are cultural.

Certain medieval theologians captured the diligence standard in the doctrine that if a person do “*quantum in se est*,” what is in him, God will grace him.⁶⁹ If what God asks of each of us in the courts of heaven is that we do “what is in us,” and not a cent more, how could Holmes and his neighbors demand more, especially under pain of criminal condemnation and punishment? If there is good and sufficient reason for not, as they say, “subjectivizing” the standard of criminal negligence, it would be that our courts happen not to be competent to do as much.

But if we have prudential reasons for hesitating or refusing to invest criminal courts with the power and responsibility to subjectivize the negligence standard, persons coming at the issue of criminal negligence from the perspective of political liberalism offer reasons of principle for altogether opposing the criminalization of any (mere) negligence. The political liberal’s leading reason for limiting criminality to cases of intentional wrongdoing is that it is *ultra vires* of a state to concern itself with actually encouraging pursuit of the good, judging the quality of a person’s pursuit of the valuable, and so forth.⁷⁰ The political liberal is pleased, on principle, if the state will confine itself to punishing people who have intentionally caused harm to others. The politician of intelligent subjectivity is not allowed this principled dispensation. Law’s office and justification are to help us and the neighbors lead valuable lives. To be sure, no one doubts that prudence must control how much the criminal law is used. But the prudential judgment of law’s place in a particular community, at a particular time stands *toto caelo* apart from an in-principle veto on law’s helping us

69. JOHN E. COONS & PATRICK M. BRENNAN, *BY NATURE EQUAL: THE ANATOMY OF WESTERN INSIGHT* 168, 171–72, 180–81 (1999).

70. See Kyron Huigens, *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431, 458 (1998); Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1424–25 (1995).

seek and find valuable ways of living.⁷¹ A jurisprudence of intelligent subjectivity will look to law and legal process to satisfy inner law's demands, that is, as a tool for encouraging pursuit and instantiation of truly valuable ways of living.

III. THE PLACE OF CONVERSION IN THE PRACTICE OF LAW

This is only the beginning of a sketch of the rule of law indicated by a jurisprudence of intelligent subjectivity—but no worries. I value Beef Wellington, so I am going to end with two pointers in the direction this is headed. After seeing the thing in the round (if only skeletally), you can begin to judge for yourself what in it might be worth pursuing.

First, I have emphasized the exigence and possibility of our *developing* as individuals, as community, and as polity. Lonergan was puzzled at people's reluctance to believe that social progress is possible. The Catholic Church, however, *developed* doctrine and practice; no longer sanctioning slavery and occluding liberty of conscience, the Church condemns slavery and promotes liberty of conscience.⁷² Thus, there is hope for us all—including our legal undertakings. But hope, if it be naïve, will cancel itself. I have emphasized the error of political liberalism's ignoring or denying our responsibility as a community to seek the good; the correlative error is to forget that people who can be good also can be very wicked. Robert Cover was right: "Legal interpretation takes place in a field of pain and death."⁷³ Rather than reduplicate the pain and death they are meant to avoid, our political and legal undertakings must reckon *intelligently* with the certainty that, sure enough, we will do evil. Sometimes evil is glamorous; other times it is merely stupid. As to the latter, a workable political and legal system must anticipate people's bucking the increase in government that is necessary if certain valuable ways of living are to be realized. But if authority is needed to resist evil, it also is needed to settle which among the mutually inconsistent valuable ways of living we shall pursue. There will be need of that true and secure tolerance that is based not on indifference or strategy, but on prior recognition of human value.

Second, we must reckon with other dimensions in which reality is not simply what meets the eye. Here we return to the problem, thematized at the outset and then reserved several times to the end, of nature's relationship to grace, and to my assertion that grace controls all that comes before, to wit, nature. Denis the Carthusian, a fifteenth-century theologian, speaks for the Catholic tradition: "There is a twofold grace or human

71. See generally ROBERT P. GEORGE, MAKING MEN MORAL (1993) (arguing that, as matter of principle, criminal law should be used prudently to assist people's moral development).

72. See John T. Noonan, Jr., *Development in Moral Doctrine*, in 54 THEOLOGICAL STUDIES 663, 664–76 (1993) (describing and defending development of Catholic moral doctrine).

73. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (footnote omitted).

perfection, then, namely, a natural one of which the philosophers speak and a supernatural one which Scripture teaches.”⁷⁴ Catholics have sometimes thought that what Denis refers to as the supernatural but “human” perfection is available only to a subset of humanity. Brittle applications of the maxim “*extra ecclesiam nulla salus*” (outside the Church there is no salvation), have not been lacking, and they have had sad social consequences. But today, in addition to condemning slavery and promoting religious liberty, the Catholic Church is witnessing both the supernatural calling of all humanity *and*, correlatively, the rights of all humanity to conditions in which human flourishing is possible. While I would not wish to obscure the obvious fact that some people are not members of the Catholic Church,⁷⁵ I would be quick to emphasize the universality of God’s saving will as the Catholic Church preaches and teaches it.

A Catholic jurisprudence affirms that all are called not just to salvation, but also to build a world populated by cities in which mutual respect is ordinary. This is not the memo issued by “Law and Economics,” nor is it the brief filed by C.L.S.; but it *is* what Catholics believe. The act of believing that we human subjects are called to and capable of more than meets the eye does not itself generate a world in which respect is our daily bread, but it *is* a start. We must anticipate that history will be, if not a decline, a dialectic of progress and regress; living under inner law requires constant vigilance, ready resilience from lapses. Progress is not the province of mere dreamers; even economists are necessary if we are to develop more worthy ways of living. If the future’s general direction is to be progress, in large measure this would be because of the concentrated efforts of those who are “painstaking enough to work out one by one the transitions to be made.”⁷⁶ The necessary conversion, as I would call it, ordinarily will take a bottom up form. The conversion is the subject’s becoming more attentive, more intelligent, more reasonable, more responsible. It is a matter of subjects’ figuring out and then pursuing what they are capable of. Getting to know ourselves is the beginning. In an older idiom, we might call this living by—and, with the virtue of prudence, making effective—the natural law, recalling that in the tradition of which that idiom is a part, the natural law is our “first grace.”⁷⁷ But in addition to these conversions that come from subjects’ deciding, one cognitive or volitional operation at a time, to follow inner law, there are the conversions that come from love’s taking over, as “when God floods our hearts with the Holy Spirit He has given

74. LOUIS DUPRE, *PASSAGE TO MODERNITY: AN ESSAY IN THE HERMENEUTICS OF NATURE AND CULTURE* 277 n.22 (1993) (quoting and discussing Denis the Carthusian).

75. See CATECHISMUS CATHOLICAE ECCLESIAE Sec. 832–35 (1997).

76. BERNARD LONERGAN, *Cognitive Structure*, in 4 *COLLECTED WORKS OF BERNARD LONERGAN* 245 (Frederick E. Crowe & Robert M. Doran eds., Univ. of Toronto Press 1988) (1967).

77. HITTINGER, *supra* note 52, at xix.

us.”⁷⁸ In this moment, “a new principle takes over,”⁷⁹ and we do what we did not know ourselves capable of. Method is turned upside down.

The jurisprudence of intelligent subjectivity that I have sketched offers important ecumenical possibilities. It takes a foundational stand on what everyone can at least begin to know about himself or herself, including where, according to inner law, we humans should universally be headed. And while it also allows room for God’s fresh surprises, it affirms what surprising and powerful things God has already done for all His human children in creating in them a desire to know all that is, which necessarily must include God Himself. Fulfillment of that desire must wait, but in the interim, inner law draws us out of ourselves to affirm more and more of the real and the good, and to live accordingly. No angels or angelic abilities are at hand to govern us. We can rely only on ourselves, including *all* that God gives us. Who will we become? One can always choose to play the buffoon—as can an entire culture, for a season.⁸⁰ Better, I think, to become persons who love, or, failing that, who at least do *quod in nobis est*.⁸¹

78. *Romans* 5:5.

79. Lonergan, *Natural Right and Historical Mindedness*, in PAPERS BY LONERGAN, *supra* note 32, at 175.

80. See Brennan, *supra* note 67, at 349 (paraphrasing, in part, Paul Kahn).

81. Cf. LONERGAN, *supra* note 62, at 717.